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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRANS UNION LLC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Coalition for Sensible Public Records Access ("CSPRA") is a not-for-profit organization dedicated to preserving the responsible commercial use of public record information. CSPRA sponsors research, publications, legislative briefings, and other activities designed to foster thoughtful debate about how privacy concerns can be addressed within the context of such use. CSPRA's members include the world's leading suppliers of information on consumers, businesses, motor vehicles, and property, including demographic and lifestyle data and database-marketing services; specialized business information products and services; decision-making intelligence and services for businesses, government agencies, and legal professionals; and consumer credit information and products. The decision below, if followed by other courts, could significantly affect their business activities and the services they provide their customers.

SUMMARY OF ARGUMENT

The decision of the D.C. Circuit in *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir.) ("*Trans Union II*"), *reh'g denied*, 267 F.3d 1138 (D.C. Cir. 2001) ("*Trans Union III*"), creates an important issue for this Court's review for four separate reasons. First, the D.C. Circuit misapplied this Court's holding in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), to create a new category of expression, less deserving of First Amendment protection, based solely on the D.C. Circuit's belief that the expression "concern[ed] no

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[1] No counsel for any party authored this brief in whole or in part. Petitioner Trans Union is a member of the Coalition for Sensible Public Records Access, but was not involved in the preparation of this brief. No other persons other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to its preparation or submission. The parties' counsel have consented to the filing of this brief, and letters reflecting that consent are submitted to the clerk's office with this brief.

public issue." *Trans Union III*, 267 F.3d at 1140 (quotation omitted). The court applied a defamation case involving false and harmful expression to determine the standard of First Amendment protection applicable to Petitioner's target marketing lists, which involve accurate, lawfully obtained information posing no threat of harm.

Second, the D.C. Circuit erroneously characterized Petitioner's target marketing lists as "solely of interest to the company and its business customers," *Trans Union II*, 245 F.3d at 818, despite overwhelming evidence that those lists are of significant interest to many U.S. consumers and businesses, and have a considerable impact on the U.S. economy.

Third, the D.C. Circuit purported to apply to its new category of expression the intermediate scrutiny traditionally reserved for restrictions on commercial speech, even though the court did not assert—much less demonstrate—that Petitioner's expression is commercial, and despite the Supreme Court's admonition in *Dun & Bradstreet* that "[w]e also do not hold . . . that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech." 472 U.S. at 762 n.8.

Fourth, while claiming to apply intermediate scrutiny, the D.C. Circuit failed to find that the government had borne its burden of proving that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree," as it was constitutionally required to do. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In fact, the D.C. Circuit failed to find that the Federal Trade Commission ("FTC" or "Commission") had shown that the restriction served *any* interest, much less an important or substantial one.

The D.C. Circuit's decision threatens not only Petitioner's expression, but also the expression of the many businesses and organizations that rely on Petitioner's target marketing lists, and myriad other valuable uses of accurate, lawfully obtained information that undergird the information society. Given the

social and economic importance of these communications, the First Amendment protection applicable to them is a matter of great significance. Yet it is precisely these communications that the FTC seeks to restrict and from which the D.C. Circuit would withdraw constitutional protection. Because of the sweeping application of the D.C. Circuit's ill-founded "no matter of public concern" standard and the vital First Amendment interests at stake, the *amicus curiae* respectfully urges the Supreme Court to grant the petition for writ of certiorari.

ARGUMENT

I. BACKGROUND

In 1996, the D.C. Circuit determined that the FTC's application of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, 1681a-1681u ("FCRA"), to restrict Petitioner from distributing target marketing lists presented "a serious First Amendment claim." *Trans Union Corp. v. FTC*, 81 F.3d 228, 235 (D.C. Cir. 1996) ("*Trans Union I*"). The court characterized the Commission's approach as requiring an "utterly wasteful expenditure of resources" and creating "what looks like a mickey-mouse exception" which "may well indicate a fatal lack of fit between the Act's goals and the FTC's means of enforcement." *Id.* Rather than rule on the constitutionality of the Commission's action at that time, however, the D.C. Circuit remanded the case "because of the very serious doubt whether Trans Union's lists are covered by the Act at all." *Id.*

Five years later, a different panel of the same court found that the First Amendment protection for Petitioner's expression had largely evaporated, because, the D.C. Circuit wrote, the target marketing lists "concerned no public issue." *Trans Union II*, 245 F.3d at 818 (quotation omitted). Relying solely on the plurality opinion of this Court in *Dun & Bradstreet*, the D.C. Circuit wrote:

> Like the credit report in *Dun & Bradstreet*, which the Supreme Court found "was speech solely in the interest of the speaker and its specific business audience," the information about individual consumers and their credit performance communicated by Trans Union target marketing lists is solely of interest to the company and its business customers and relates to no matter of public concern.

Id. at 818 (quoting *Dun & Bradstreet*, 472 U.S. at 762) (citations omitted). The D.C. Circuit, therefore, concluded that Petitioner's target marketing lists warranted "reduced constitutional protection." *Id.* (quotation omitted). Without stating what that reduced level of protection was or citing any evidence, the court determined that the FTC's action met the required standard, and so upheld the FTC's decision prohibiting Petitioner from communicating its lists without first obtaining affirmative opt-in consumer consent. *Id.* at 819.

On petition for rehearing, the D.C. Circuit again asserted that "[t]he important point is that here, as in *Dun & Bradstreet*, the targeted speech solely interests the speaker (Trans Union) and its 'specific business audience' (its customers)." *Trans Union III*, 267 F.3d at 1140 (quoting *Dun & Bradstreet*, 472 U.S. at 762). The court, however, went further to cite this conclusion as justification for ignoring Supreme Court cases that "struck down privacy-based restrictions on the publication of truthful information" and that required that restrictions on even commercial speech be narrowly tailored. *Id.* at 1141 (quotation omitted).

These errors threaten not only Petitioner's expression and that of the many businesses and organizations that rely on Petitioner's target marketing lists, but also meaningful First Amendment protection for the myriad other valuable uses of accurate, lawfully obtained information that undergird the information society. As a result, this case warrants the Supreme Court's review.

II. THE D.C. CIRCUIT ERRED IN APPLYING *DUN & BRADSTREET* TO CREATE A "NO MATTER OF PUBLIC CONCERN" STANDARD FOR TRUE, LAWFULLY-OBTAINED EXPRESSION.

The D.C. Circuit's application of *Dun & Bradstreet* to justify "reduced constitutional protection" for Petitioner's expression misapplies this Court's decision in that case, and ignores extensive Supreme Court precedent.

The issue before the Court in *Dun & Bradstreet* was whether the heightened constitutional protection that the Court had applied to false and defamatory speech in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), should be extended to a false and defamatory credit report that was communicated under a promise of confidentiality to five subscribers. 472 U.S. 751-53. The erroneous information—that Greenmoss Builders had declared bankruptcy—was, in the plurality's words, not merely "false," but "grossly misrepresented respondent's assets and liabilities." *Id.* at 751. The potential for that information to be used to harm Greenmoss Builders was obvious, and the severity of the resulting harm had already been demonstrated to be great.

The Court's conclusion that the speech was "solely in the individual interest of the speaker and its specific business audience," *id.* at 762, was relevant only because of these distinct features of the case. As the plurality in *Dun & Bradstreet* wrote: "This particular interest [the protection of false, defamatory expression] warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation." *Id.*

In the present case, by contrast, there is no suggestion that the expression involved is either false or defamatory. The information contained in the lists provided by Petitioner—the names and mailing addresses of consumers meeting basic criteria (for example, the existence of two tradelines—*i.e.*, credit cards or revolving credit accounts, *Trans Union I*, 81

F.3d at 229-30)—poses no risk of harm to consumers. A consumer receiving an offer in which he or she is not interested can simply discard it, as this Court has repeatedly noted.[2] There is no suggestion that the information was or could be defamatory, embarrassing, or harmful in any way.

In addition, *Dun & Bradstreet* involved the distribution of detailed information about a business to subscribers who sought the data to determine whether or not to engage in a specific business transaction with the subject of the credit report.

Target marketing lists, by contrast, work in almost the opposite way. Petitioner's customers specify certain broad criteria, and Petitioner provides a list of consumers meeting those criteria. Information is not sought about a specific consumer. The customer then uses that information solely for the purpose of communicating with those consumers. The information is essential to the communication.

In sum, unlike the situation in *Dun & Bradstreet*, this case does not involve information sought about a specific consumer, the information that is revealed by the presence of a name on a list is very general and poses little if any risk of harm, the information is accurate, and Petitioner communicates it to its customers so that they can use the information to communicate with individual consumers.

In this context, *amicus curiae* respectfully submits that the D.C. Circuit was wrong to conclude that this case is controlled by *Dun & Bradstreet* or that the plurality opinion there justifies, much less mandates, a lower standard of First Amendment scrutiny of true, lawfully obtained lists of consumer names and addresses. The D.C. Circuit ignored this Court's admonition that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield*, 507 U.S. at 767.

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[2] *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983); *see also Edenfield*, 507 U.S. at 776.

The D.C. Circuit's error threatens a wide range of speech that, under this Court's First Amendment jurisprudence, should receive full First Amendment protection. The expression put at risk by application of a "no matter of public concern" standard includes "the newspaper that discusses business affairs, almost entirely in order to make money by helping its readers do well in business," the "product review written by its author because he wants to be paid, published by the newspaper because it wants to keep its paying subscribers, and read by readers because they want to know how to best spend their money," and the "union buying TV ads urging people to 'Buy American' because that's the best way of maintaining the viewers' (and the union members') standard of living." Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1081-82 (2000).

The D.C. Circuit's willingness to reduce the standard of First Amendment protection for expression that it believes addresses "no matter of public concern" ignores the precedents of this Court and threatens a wide array of heretofore fully protected expression. Review by the Supreme Court is urgently needed.

III. THE D.C. CIRCUIT ERRED IN ITS ASSUMPTION THAT TARGET MARKETING LISTS ARE OF "NO PUBLIC CONCERN."

The D.C. Circuit also erred in its factual assumption that Petitioner's target marketing lists are "solely in the [individual] interest of the speaker and its specific business audience." *Trans Union II*, 245 F.3d at 818 (quotation omitted).

Trans Union prepares target marketing lists for many purposes. For example, the record below shows that Petitioner has provided lists to the Republican National Committee so that it might solicit campaign contributions (A0841-46, A2376-77),[3]

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[3] Citations to "A___" refer to the joint appendix in the D.C. Circuit.

and to the United Way so that it might solicit charitable donations (A2376). It is simply incorrect to characterize these communications as being "solely in the [individual] interest of the speaker and its specific business audience" and "relat[ing] to no matter of public concern," *Trans Union II*, 245 F.3d at 818 (quotation omitted), or to subject restrictions on those communications to less than full First Amendment scrutiny.

Petitioner also communicates lists of consumers to businesses so that they can market products and services. More than two-thirds of U.S. consumers—132 million adults—take advantage of direct marketing opportunities each year. DIRECT MARKETING ASSOCIATION, ECONOMIC IMPACT: U.S. DIRECT MARKETING TODAY (5th ed., 2000). In 2000, target marketing lists like those supplied by Petitioner generated $584 billion in sales to consumers—eight percent of all consumer sales. *Id.*

Petitioner's target marketing lists benefit more than just the businesses that use those lists to communicate with consumers and the 132 million consumers who respond to those communications each year. As Federal Reserve Board Governor Edward Gramlich testified before Congress in July 1999, "[i]nformation about individuals' needs and preferences is the cornerstone of any system that allocates goods and services within an economy," and the more such information is available, "the more accurately and efficiently will the economy meet those needs and preferences." *Financial Privacy, Hearings Before the Subcomm. on Financial Institutions and Consumer Credit of the House Comm. on Banking and Financial Services*, 106th Cong. (July 21, 1999) (statement of Edward M. Gramlich).

Targeted lists, like Petitioner's, make it possible for political parties, charitable organizations, and businesses to communicate directly to precisely those consumers who are most likely to be interested in the communications. This generates substantial benefits to the public. Target marketing lists increase the likelihood that only people likely to be

interested in an offer get one. This means that fewer people who are not likely to be interested receive one, thereby saving the business and its customers money, reducing unwanted mail (and the environmental waste it involves), and minimizing the burden on consumers having to sort through solicitations in which they clearly have no interest. This also means a higher response rate so the business, political party, or charity generates more revenue for every dollar it invests in the solicitation.

Target marketing lists benefit consumers in other ways as well. For consumers who are interested, they get an offer (often with a coupon or other discount) that they can use. The offer can be better (the product or service cheaper, or the discount greater) because of the precision with which it can be tailored. That tailoring is based on demonstrated preferences, not intrusive or time-consuming questioning or broad generalizations. Consumers also benefit from the increased competition and product specialization and innovation that target marketing makes possible.

It is simply untrue to assert that these communications are "solely in the [individual] interest of the speaker." *Trans Union II*, 245 F.3d at 818 (quotation omitted). Quite the contrary: the efficient targeting of marketing lists is of interest to all consumers. As the Federal Reserve Board has noted, "it is the freedom to speak, supported by the availability of information and the free-flow of data, that is the cornerstone of a democratic society and market economy." BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT TO THE CONGRESS CONCERNING THE AVAILABILITY OF CONSUMER IDENTIFYING INFORMATION AND FINANCIAL FRAUD 2 (1997). The D.C. Circuit's decision upholding the FTC's restriction on Petitioner's expression, "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Edenfield*, 507 U.S. at 766. The decision warrants

review by the Supreme Court.

IV. THE D.C. CIRCUIT ERRED IN APPLYING THE *CENTRAL HUDSON* COMMERCIAL SPEECH TEST TO PETITIONER'S EXPRESSION.

Although the D.C. Circuit based its decision to deny full First Amendment protection to Petitioner's expression on its assumption that the expression addressed "no matter of public concern," *Trans Union II*, 245 F.3d at 818, the court applied the First Amendment scrutiny developed by this Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), and traditionally reserved only for reviewing restrictions on commercial expression.

Petitioner communicates the names and contact information of consumers meeting general selection criteria to its customers. This expression in no way "propose[s] a commercial transaction," as this Court has consistently required throughout the past decade as a condition for applying the intermediate scrutiny of *Central Hudson*. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (quotation omitted); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995); *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 (1993). In fact, in *Dun & Bradstreet* itself, the Court specifically clarified that its decision was not intended to reduce the First Amendment protection afforded to credit reports: "We also do not hold . . . that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech." 472 U.S. at 762 n.8.

While, as noted above, many customers use the information they receive from Petitioner to send commercial solicitations to individual consumers, this does not make Petitioner's expression commercial speech, any more than a reader acting on information he or she has read in a newspaper makes the newspaper commercial speech.

Moreover, the nature and purpose of communications that rely on Petitioner's target marketing lists vary widely. The communications seeking political and charitable contributions that relied on lists provided by Petitioner (A0841-46, A2376-77) are in no sense commercial, but they are impeded, if not effectively prohibited, by the restrictions on Petitioner's expression that the D.C. Circuit reviewed under intermediate scrutiny.

This contributes to explaining the importance of this case: The FTC's interpretation of the FCRA actually restrains two separate communications: (1) the communication by Petitioner of the list of names (and related contact information) meeting the customer's parameters; and (2) the customer's communication to the individuals whose names are contained on the list. By prohibiting Petitioner from communicating its lists, the Commission is restricting not only Petitioner's expression, but also that of its customers.

The D.C. Circuit's error is a significant one because it misstates the First Amendment standard of review applicable to a wide range of true, lawfully-obtained information that is used for communicating important information to consumers. Businesses, political parties, charities, and religious and fraternal groups all rely on computerized information, often obtained from third parties, to contact consumers, solicit members, motivate public interest, and serve other valuable needs of the organizations and of the public. The breadth of the D.C. Circuit's opinion, and the fact that is not grounded in any existing precedent, threatens a wide array of expression. Already, the United States District Court for the District of Columbia has cited the D.C. Circuit's erroneous statement as to the sway of *Dun & Bradstreet* in a decision reviewing the Gramm-Leach-Bliley Financial Services Modernization Act. *Individual Reference Servs. Group v. FTC*, 145 F. Supp. 2d 6, 40-41 (D.D.C.), *appeal filed*, No. 01-5202 (D.C. Cir. 2001). The magnitude of this threat justifies review by this Court.

V. THE D.C. CIRCUIT ERRED IN ITS APPLICATION OF INTERMEDIATE SCRUTINY.

A. The Court Did Not Require the Government To Demonstrate Either a Substantial Interest or That the Restraint on Petitioner's Expression Was Narrowly Tailored.

Even if the First Amendment standard of review applicable to commercial speech were applicable here, the D.C. Circuit established a new, emaciated version of that standard that conflicts with decisions of this Court.

Under this Court's precedents, the D.C. Circuit was obligated to determine whether the government's interest in restricting Petitioner from communicating its target marketing lists was "substantial, whether the challenged regulation advances these interests in a direct and material way, and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield*, 507 U.S. at 767.

This Court has repeatedly stressed that "[i]t is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it,'" and that "[t]his burden is not satisfied by mere speculation or conjecture." *Id.* at 770 (quotation and citation omitted). "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71. This necessarily requires a "careful[] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." *Cincinnati*, 507 U.S. at 417 (quotation omitted).[4]

[4] *See also Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985); *Bolger*, 463 U.S. at 71 n.20, 73-74; *In re R.M.J.*, 455 U.S. 191, 205-06 (1982); *Central Hudson*, 447 U.S. at 569-71; *Friedman v. Rogers*, 440 U.S. 1, 13-16 (1979); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).

The D.C. Circuit wholly failed to perform the "careful calculation" required by this Court. As evidence of the substantiality of the government's interest the court offered only one sentence: "The 'Congressional findings and statement of purpose' at the beginning of the FCRA state: 'There is a need to insure that consumer reporting agencies exercise their grave responsibilities with . . . respect for the consumer's right to privacy.'" *Trans Union II*, 245 F.3d at 818 (quoting 15 U.S.C. § 1681(a)(4)). This one line constitutes the court's entire discussion of the importance of the interest being served by the Commission's ban on Petitioner's expression. This cannot meet the standard required by the Supreme Court.

The D.C. Circuit's analysis in *Trans Union II* of the link between the Commission's ban and the purpose it is alleged to serve similarly ignored Supreme Court precedent. In fact, that analysis consists entirely of negative statements excusing the ill-fit between means and objective: "Congress had no obligation to choose the least restrictive means of accomplishing its goal," *id.* at 819; "neither a perfect nor even the best available fit between means and ends is required," *id.* (quotation omitted). The D.C. Circuit clearly states what the FTC's ban is *not*, but it gives no indication of whether the ban satisfies the standard set forth by this Court.

In its denial of a Petitioner's petition for rehearing, the D.C. Circuit asserted—for the first time—that the Commission's ban "unquestionably advances the identified state interest." *Trans Union III*, 267 F.3d at 1141. Unfortunately, without a clearer understanding of what the state's interest is and in the absence of any explanation by the court, it is difficult to know how the D.C. Circuit reached this conclusion.

B. The Restriction on Petitioner's Expression Fails To Serve Any Plausible Interest.

The D.C. Circuit's quotation from the FCRA about a "'consumer's right to privacy,'" *Trans Union II*, 245 F.3d at 818 (quoting 15 U.S.C. § 1681(a)(4)), suggests two possible interests the FTC might assert its restriction on Petitioner's expression serves. One is protecting consumers from the disclosure of information contained in target marketing lists. The only information conveyed, however, is name, address, and the fact that the individual meets certain broad criteria, such as possessing two or more credit cards. This information is either inherently public or readily observable, and, in any event, poses little if any risk of harm to consumers. Moreover, under the FCRA, Petitioner is free to convey this information and much more detailed financial information to its customers, without obtaining individual consent, for the purpose of sending prescreened credit and insurance offers. 15 U.S.C. § 1681m. How can the far more limited information communicated about a customer in a target marketing list constitute a violation of his or her privacy rights?

Moreover, Petitioner provides its customers with target marketing lists for the sole purpose of enabling those customers to communicate with the consumers whose names are on the list. The information cannot be used for any other purpose. What privacy right is at stake and how does the communication of these lists offend it? The Court, citing to a long line of prior decisions, reasserted this past spring "that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Bartnicki v. Vopper*, 532 U.S. 514, 534 n.21 (2001) (quotation omitted).

This was the view of the Tenth Circuit in *U.S. West, Inc. v. FCC*, when it struck down Federal Communication Commission rules requiring that telephone companies obtain opt-in consent before using data about customers' calling patterns to market products or services to them. 182 F.3d 1224

(10th Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000). The Tenth Circuit wrote that the government must show that the information the law would protect as private would inflict "specific and significant harm on individuals," and that:

> Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under *Central Hudson* for it is not based on an identified harm.

Id. at 1235. The D.C. Circuit's decision conflicts directly with this Tenth Circuit case.

The other possible privacy interest that the government might assert is to protect individual consumers from receiving unsolicited communications—commercial or otherwise. This Court, however, has consistently rejected the claim that unsolicited communications constitute a meaningful harm or warrant government restrictions on expression. Even if commercial (and only a portion of those communications facilitated by Petitioner's target marketing lists are), this Court has written: "If they are unreceptive to his initial telephone solicitation, they need only terminate the call. Invasion of privacy is not a significant concern." *Edenfield*, 507 U.S. at 776. As this Court stated in *Bolger*: "Recipients of objectionable mailings . . . may effectively avoid further bombardment of their sensibilities simply by averting their eyes." 463 U.S. at 72 (quotation omitted). "[T]he short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Id.* (quotation omitted). "[W]e have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* Yet

this is precisely what the D.C. Circuit has permitted the FTC to do.

Consumer behavior seems to reflect the Court's view: fewer than three percent of consumers take advantage of opportunities to opt out of target marketing that have existed for more than thirty years.[5] In sum, it is impossible to discern what constitutionally cognizable harm the D.C. Circuit believes the FTC is preventing by restricting Petitioner's expression.

C. The D.C. Circuit Ignored the Fact That Opt-Out Is Substantially Less Restrictive of Petitioner's Expression Than Opt-In.

The D.C. Circuit disregarded its constitutional obligation, under the intermediate scrutiny standard it chose to apply, to ensure that the restraint on Petitioner's expression was narrowly tailored. The court rejected Petitioner's argument that an opt-out system would be substantially less burdensome than an opt-in system, with the cursory observation that "[a]lthough the opt-in scheme may limit more Trans Union speech than would the opt-out scheme the company prefers, intermediate scrutiny does not obligate courts to invalidate a 'remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests.'" *Trans Union III*, 267

[5] Since 1971, the Direct Marketing Association ("DMA") has operated the Mail Preference Service (and, more recently, the Telephone Preference Service and now the E-Mail Preference Service). With a single request to each, it is possible to be removed from most DMA-member company mailing, telephone, and e-mail solicitation lists. The DMA reports, however, that less than three percent of the U.S. adult population use the service. *Financial Privacy, Hearings Before the Subcomm. on Financial Institutions and Consumer Credit of the House Comm. on Banking and Financial Services*, 106th Cong. (July 20, 1999) (statement of Richard A. Barton). Financial institutions, retailers, and other businesses report similar or lower figures for their opt-out programs. *Privacy, Hearings Before the Senate Comm. on Commerce*, 107th Cong. (July 11, 2001) [hereinafter *Privacy*] (statement of Fred H. Cate).

F.3d at 1143 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 217-18 (1997)).

The court's characterization of "opt-out" (under which consumers who do not want credit report information used in the creation of target marketing lists would express their objection) as "marginally less intrusive" on Petitioner's First Amendment-protected expression than "opt-in" (under which consumers who do want their credit report information used in the creation of target marketing lists would express their consent) is not merely unsupported, but ignores the hostility that the Supreme Court has shown to conditioning expression on opt-in consent. This Court has struck down ordinances that would require affirmative consent before receiving door-to-door solicitations, *Martin v. Struthers*, 319 U.S. 141 (1943), before receiving Communist literature, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), even before receiving "patently offensive" cable programming, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Yet this is precisely what the FTC wishes to require Petitioner to obtain before it communicates its target marketing lists.

This Court's decision in *Edenfield*, striking down a Florida opt-in law applicable to commercial solicitations by certified public accountants, is directly on point: "In the commercial context, solicitation may have considerable value . . . . Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." 507 U.S. at 766.

The D.C. Circuit also ignored the wealth of research demonstrating that it is far more expensive, and often impossible, for a potential user of information to obtain consumer consent for a use of information that the user already possesses.[6] U.S. West, one of the few U.S. companies to use an

[6] *See, e.g.*, MICHAEL A. TURNER & LAWRENCE G. BUC, THE IMPACT OF DATA RESTRICTIONS ON FUNDRAISING FOR CHARITABLE & NONPROFIT

opt-in system, found that to obtain permission to use information about its customer's calling patterns to market services to them required an average of 4.8 calls to each customer household before the company reached an adult who could grant consent. Brief for Petitioner and Intervenors at 15-16, *U.S. West,* 182 F.3d 1224 (No. 98-9518). In one-third of households called by U.S. West, the company never reached the customer, despite repeated attempts. *Id.* Mailed solicitations for opt-in consent are no more likely to reach consumers. The U.S. Post Office reports that fifty-two percent of unsolicited mail in this country is discarded without ever being read. *Briefs*, CIRCULATION MGMT., May 1999.

It is also more expensive for businesses to contact each consumer individually to seek consent to use information than for consumers to take advantage of existing business phone lines and customers service centers to opt out. U.S. West found that to obtain permission to use information about its customers' calling patterns to market services to them cost almost $30 per customer contacted. Brief for Petitioner and Intervenors at 15-16, *U.S. West,* 182 F.3d 1224 (No. 98-9518). And while U.S. West was contacting its own customers, with whom it already had an on-going relationship, Petitioner would be contacting people with whom it had no direct relationship.

INSTITUTIONS (2002); MICHAEL E. STATEN & FRED H. CATE, THE IMPACT OF OPT-IN PRIVACY RULES ON RETAIL CREDIT MARKETS: A CASE STUDY OF MBNA (2001); JOHN M. BARRON & MICHAEL E. STATEN, THE VALUE OF COMPREHENSIVE CREDIT REPORTING: LESSONS FROM THE US EXPERIENCE (2001); FRED H. CATE, OPT-IN EXPOSED (2001); MICHAEL A. TURNER, THE IMPACT OF DATA RESTRICTIONS ON CATALOG AND INTERNET APPAREL RETAILERS (2001); CYNTHIA GLASSMAN, CUSTOMER BENEFITS FROM CURRENT INFORMATION SHARING BY FINANCIAL SERVICES COMPANIES (2000); FRED H. CATE & MICHAEL E. STATEN, PROTECTING PRIVACY IN THE NEW MILLENNIUM: THE FALLACY OF "OPT-IN" (2000); ROBERT E. LITAN, BALANCING COSTS AND BENEFITS OF NEW PRIVACY MANDATES (1999); WALTER KITCHENMAN, US CREDIT REPORTING: PERCEIVED BENEFITS OUTWEIGH PRIVACY CONCERNS (1999).

This explains why much of the research on opt-in highlights the special burdens opt-in imposes on new market entrants and the development of new products and services by "rais[ing] barriers to entry by smaller, and often more innovative, firms and organizations." LITAN, *supra* note 6, at 4-5.

The presumption of opt-in that consumers do not wish to be contacted is unwarranted in light of the fact that two-thirds of American consumers make purchases in response to targeted offers, and fewer than three percent take advantage of opportunities to opt out. *Privacy*, *supra* note 5, (statement of Fred H. Cate).

The costs, inconvenience, and economic impact of opt-in appear all the more unjustified in view of the Court's characterization of the privacy interests at stake as "not a significant concern." *Edenfield*, 507 U.S. at 776. This may explain why opt-in is used so rarely in U.S. law. In the FCRA, for example, Congress required that consumer reporting agencies like Petitioner give consumers an opportunity to opt out—not opt in—to the processing of their most intimate financial information for the purpose of sending firm offers of credit or insurance. 15 U.S.C. § 1681m.

The D.C. Circuit ignored both legal precedent and extensive research and practical experience to conclude that opt-out was only "marginally less intrusive" on Petitioner's "First Amendment interests" than opt-in. *Trans Union III*, 267 F.3d at 1143 (quotation omitted). Most significantly, the D.C. Circuit identified no evidence at all for its conclusion that the FTC's restriction on Petitioner's expression was sufficiently narrowly tailored. The D.C. Circuit's silence contrasts starkly with the evidence on which the Supreme Court relied in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), to uphold a Florida law restricting attorney solicitations. In that case, involving only a temporary restriction on solicitation of accident victims by licensed members of the bar, the Court cited to a "106-page summary of [the Florida Bar's] 2-year study of lawyer

advertising and solicitation" and an "anecdotal record . . . noteworthy for its breadth and detail." *Id.* at 626-27.

The existence of a widely used, less restrictive alternative to opt-in casts substantial doubt on whether the FTC's restriction on Petitioner's expression is narrowly tailored to serve a substantial interest.

The D.C. Circuit's failure to require the government to demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree," as required by this Court, *Edenfield*, 507 U.S. at 771, threatens not only Petitioner's expression, and that of its customers, but also that of similarly situated organizations that communicate information about consumers. Those communications undergird a substantial part of American commerce; they are valuable to consumers, businesses, and political and charitable organizations alike. They warrant, and under this Court's precedents are guaranteed, greater constitutional protection than that afforded them by the D.C. Circuit.

CONCLUSION

Because of the vital First Amendment interests at stake in the D.C. Circuit's application of a novel and sweeping "no matter of public concern" standard, and the broad social and economic importance of the information that the FTC seeks to restrict, the *amicus curiae* respectfully urges the Supreme Court to grant the petition for writ of certiorari.

Respectfully submitted,

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